No. 92-841

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

CITY OF EL MONTE,
Petitioner,
vs.
OTHA THOMAS RHODES,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Does 42 U.S.C. § 1983 permit a damage recovery against a municipality absent a direct causal connection between the municipality's customs and the plaintiff's injury?

(2) Does 42 U.S.C. § 1983 permit a damage recovery against a municipality absent evidence that the municipality's customs resulted from a course of events or circumstances that would permit an inference of deliberate indifference or tacit authorization of the offensive act?

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IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1992

CITY OF EL MONTE, Petitioner,

v.

OTHA THOMAS RHODES, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, CITY OF EL MONTE,[1/] respectfully prays that a writ of certiorari issue to review the memorandum decision of the United States Court of

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1/ Petitioner, CITY OF EL MONTE, and Respondent, OTHA THOMAS RHODES, are the only parties to the instant action.

Appeals for the Ninth Circuit, entered in the above-entitled proceeding on April 1, 1992.

OPINIONS BELOW

The memorandum decision of the Court of Appeals for the Ninth Circuit, filed April 1, 1992, has not been reported. It is reprinted in the Appendix hereto, A 1-8.

The order of the Court of Appeals for the Ninth Circuit denying rehearing, filed July 12, 1992, has not been reported. It is reprinted in the Appendix hereto, B 1-2.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 1983 and 42 U.S.C. § 1985, the respondent brought this suit in the Central District of California. On March 7, 1989, the Central District entered judgment on the jury's verdict in favor of respondent. See Appendix C 1-2.

On petitioner's appeal, the Ninth Circuit on April 1, 1992, entered a memorandum decision affirming the Central District's judgment in favor of respondent under § 1983. The Ninth Circuit denied petitioner's rehearing petition on July 17, 1982. See Appendix D 1-2.

On October 5, 1992, Justice Sandra D. O'Connor ordered that the time for filing this petition for writ of

certiorari be extended to and including November 13, 1992.

The jurisdiction of this court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1983. *Civil action for deprivation of rights*

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

On June 6, 1986, El Monte, California police officers were dispatched to investigate a possible stabbing incident. The officers who arrived at the scene encountered a crowd of belligerent individuals. Officers discovered a loaded rifle during their investigation. During the questioning that ensued, respondent was

arrested for obstructing the investigation, a violation of California Penal Code § 148. Respondent contended that, during this arrest, he was beaten with batons and suffered abrasions to his forehead and a swollen lip.

On April 23, 1987, respondent filed a complaint alleging that he had been arrested without probable cause and had been subjected to excessive force, each in violation of his constitutional rights redressable under 42 U.S.C. § 1983. The case went to the jury against petitioner City of El Monte and two of its police officer employees.

On March 1, 1989, the jury returned a verdict in favor of the officers but against petitioner in the amount of $85,000.00. Petitioner moved for judgment notwithstanding the verdict. The district court denied that motion. Petitioner then appealed from the judgment and from the denial of its motion for judgment notwithstanding the verdict. Petitioner argued (as it had in the district court) that the law of § 1983 municipal lability predicated on "custom" requires the existence of "deliberate indifference" on the part of municipal policymakers which "directly causes" the claimed constitutional violation.

On April 1, 1992, the Ninth Circuit filed its memorandum decision in *Rhodes v. El Monte*, 959 F.2d 241 (Table) (9th Cir. 1992). The Ninth Circuit's decision affirmed the District Court's judgment and denial of petitioner's motion for judgment notwithstanding the verdict, thereby holding petitioner liable under § 1983 and obviating the need to consider the evidence supporting respondent's § 1985 and state

law claims. The court of appeals' opinion did not identify any evidence which would give rise to an inference of "deliberate indifference" by petitioner's policymakers or point to any evidence of a direct causal connection between any of petitioner's customs and respondent's alleged injury.

REASONS FOR GRANTING THE WRIT

I.

The Ninth Circuit's opinion departs from well-established law on § 1983 municipal liability predicated on "custom."

In *City of Canton v. Harris*, 489 U.S. 378 (1989) it was held that, in section 1983 cases where the alleged "custom" is one of omission, the evidence must establish a "deliberate indifference to the rights of persons with whom the police come in contact" on the part of the municipal policymakers. (*Id.*, at 1204.) In such cases, section 1983 municipal liability can attach only when a municipality's policy represents "a deliberate choice [by the municipality's authorized policymakers] to follow a course of action . . . made from among various alternatives." (Pembaur v. Cincinnati, 475 U.S. 469, 483-484 (1986).) In addition to the "deliberate indifference" standard, the *Canton* court held that a direct causal link must exist between the "custom" and the particular constitutional violation. (*City of Canton v. Harris*, *supra*, 489 U.S. at pp. 391-392.)

The Seventh Circuit has considered the proof required to establish municipal liability on the basis of

inaction in response to unconstitutional misconduct on the part of municipal employees. In *Sims v. Mulcahy*, 902 F.2d 524 (7th Cir. 1990), *cert. denied* 111 S.Ct. 249 (1990), the court held that the quantum of evidence needed is considerably greater where the particular custom which allegedly resulted in the plaintiff's injuries involves a course of municipal inaction which is a good deal removed from the constitutional deprivation alleged. A plaintiff who faults a municipality's inaction must show that there is an extremely high degree of municipal culpability. (*Id.*, at 543.) The court then concluded that:

> "No municipality may be held liable for its indifference to the mere possibility of a constitutional violation. Rather, the plaintiff must prove the municipality was aware either of actual deprivations or such a strong likelihood of imminent (though unrealized) deprivations that any reasonable person would have taken preventive measures." . . . Where the custom itself does not establish wrongdoing, there must be evidence of a course of events or circumstances that permit an inference of deliberate indifference or tacit authorization of the offensive acts."

(*Id.*, at 543-44.)

Thus, where there is an absence of evidence sufficient to establish a "direct causal link between a municipal policy or custom, and the alleged constitutional

deprivation" (*City of Canton v. Harris*, *supra*, 109 S.Ct. at 1203), a plaintiff has failed to establish an element essential to his/her case on which he/she bears the burden of proof at trial. (See *Sims v. Mulcahy*, *supra*, 902 F.2d at 544.) The municipal policy or custom must be the direct cause of--the "moving force" behind--the constitutional violation. (*Polk County v. Dodson*, 454 U.S. 312, 326 (1981); *Kirkpatrick v. Los Angeles*, 803 F.2d 485, 491 (9th Cir. 1986).)

In *Strauss v. Chicago*, 760 F.2d 765 (7th Cir. 1985), plaintiff alleged that the city had a custom of conducting investigations against police officers which exonerated officers as a result of the investigative procedures employed and which would result in the continued employment of brutal officers. In affirming the lower court's dismissal of plaintiff's complaint for failure to state a claim, the court held that plaintiff's suggestion that the exoneration of 93-94% of all officers over a three year period meant that the City's method of review was weighted in favor of the officers was specious. The Court then concluded that:

> "The number of complaints filed, without more, indicates nothing. People may file a complaint for many reasons, or for no reason at all. That they file complaints does not indicate that the policies that Strauss alleges exist do in fact exist and did contribute to his injury."

(*Id.*, at 769.)

II.

The evidence of custom in this case is insufficient as a matter of law to impose liability on petitioner.

In its memorandum opinion, the Ninth Circuit cited nine separate "customs" which it attributed to petitioner. (Memorandum decision at pp. 6-7.) Nowhere in its memorandum opinion does the Ninth Circuit cite any law or make any finding that any of these "customs" is, in and of itself, unconstitutional. Consequently, there has been no finding in this case that respondent's injury was caused by the implementation of an unconstitutional policy maintained by petitioner.

Rather, the Ninth Circuit has held that the "customs" which it found petitioner and its police department had maintained demonstrated a "conscious decision on the part of the city to avert its eyes to the misconduct of its police officers." (Memorandum decision at p. 6.)

But in *City of Oklahoma City v. Tuttle*, 471 U.S. 808, (1985) this court held that:

> " . . . where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality and the causal connection between the "policy" and the constitutional deprivation."

(*Id.*, at 824.)

Similarly, the court in *Sims v. Mulcahy*, *supra*, held that:

> "Where the custom itself does not establish wrongdoing, there must be evidence of a course of events or circumstances that permit an inference of deliberate indifference or tacit authorization of the offensive acts."

(*Id.*, at 543-44.)

A. There is no evidence of deliberate indifference.

The record is completely devoid of any evidence whatsoever of any "course of events or circumstances" indicating prior instances where petitioner's police officers engaged in unconstitutional acts as a result of the "customs" cited by the Ninth Circuit. In light of the absence of any evidence of a "course of events or circumstances" as a basis for concluding that petitioner's policymakers made a "conscious decision" to avert their eyes to the misconduct of their police officers, the Ninth Circuit created a presumption of indifference in derogation of the evidence produced at trial. This approach to *Monell* liability ignores the teachings of *Tuttle* and its progeny. In the absence of any evidence of prior misconduct resulting from these "customs," there is no evidence that petitioner had notice of this problem, and thus no evidence from which an inference of

"deliberate indifference" by the policymakers could be drawn.

B. No "custom" directly caused respondent's injury.

Careful scrutiny of each "custom" upon which the Ninth Circuit relied shows that it is impossible to infer that any custom, constitutional or not, caused respondent's injury.

1. The printed "warning" did not cause respondent's injury.

The Ninth Circuit first points out that "the form in which complaints against officers must be set out warns potential complainers that it is a violation of the law to make a false complaint, but there is no similar inscription on the form used for non-police complaints." (Memorandum decision at 6.) There was not a scintilla of evidence produced at trial that any citizen was deterred from filing a complaint against any police officer because of the inscription on the form for such complaints. It is merely the court of appeals' own conjecture that this could occur.

Moreover, the only possible remedies for this "custom" would be either to remove the inscription from the form for citizen's complaints, or to add the inscription to all departmental forms. In the absence of evidence that the inscription deterred complaints, its deletion could hardly be expected to affect police misconduct. The addition of the warning to all departmental forms would clearly be superfluous, since

such forms do not even come into play in the citizen's complaint process. Given the state of the record in this case, there is simply no evidence that this "custom" directly caused respondent's injury, or that either alternative thereto would have prevented the injury.

2. Watch Commanders' "rejections" of citizens' complaints have not been shown to have caused respondent's injury.

The court of appeals' decision faults petitioner for allowing "watch commanders to reject citizens' complaints". However, nowhere in the record is there any evidence that any watch commander had ever used this prerogative to wrongfully reject a meritorious complaint. In *Bryant v. Whalen*, 759 F.Supp. 410 (N.D. Ill. 1991), it was held that statistics of unsustained complaints of excessive force, without any evidence that those complaints had merit, will simply not suffice to establish municipal liability under section 1983. For the same reasons, evidence of discretion to "reject" citizens' complaints, without evidence that meritorious complaints were so rejected, cannot be sufficient to establish municipal liability.

In the absence of any evidence that any watch commander ever rejected a meritorious complaint, there is a complete failure of proof that any City of El Monte police officer was ever inclined to engage in unconstitutional conduct in hope that the complaint of such misconduct would be arbitrarily rejected. As a result, the record in this case completely fails to raise even the inference of a causal connection between this "custom" and any constitutional injury to this respondent.

3. The timing of internal investigations did not cause this respondent's injury.

Next, the court of appeals found that "the City will not investigate allegations of misconduct if a criminal charge that arose from the incident is pending, a practice that conceivably encourages abusive officers to level false criminal charges in order to forestall an investigation into their conduct." (See Memorandum opinion at 6; emphasis added.)

This finding stems from the illogical premise that a police officer would attempt to forestall an inevitable investigation by committing perjury. Since the "forestalled" investigation is inevitable, it would be foolish to level a false charge against a citizen. An officer who did so would face even greater administrative, civil and criminal consequences than would have awaited him otherwise.

Furthermore, a prudent reason supports this procedure. Much information necessary to resolve a citizen's complaint will come to light during the criminal proceeding, thereby resolving many issues in a citizen's complaint without wasting City funds.

In conclusion, the court of appeals merely found that such a custom could "conceivably" encourage abuses, a finding which is far short of one of actual direct causation, a finding required by *Tuttle* and its progeny in order to establish municipal liability.

4. The "custom" of declining to investigate except on complaint by the "victim" did not cause this respondent's injury.

The court of appeals next found that "although witness reports are generally sufficient to cause the department to initiate criminal investigations, the department will not investigate a report of police misconduct unless the victim of the misconduct comes forward." (Memorandum decision at 6.)

This finding is not supported by the record. The testimony from Chief Clayton was that a supervisor takes information from any witness that observes a police officer's use of force. Even though a victim does not come forward, that supervisor may and has the option to cause some action, administrative or criminal. Additionally, the department could seek out the victims if the facts indicated doing so would be necessary or appropriate. Even without the victim, a supervisor can proceed based merely upon the witness' information. The evidence does not demonstrate petitioner will not investigate purported police abuse under such circumstances.

Furthermore, the record in this case is devoid of any evidence that this "custom" was ever actually implemented by petitioner's administrators. In the absence of any evidence that any complaint was in fact set aside in this manner, there has been a complete failure of proof of any fact from which it could be inferred that this respondent's injury was directly caused by this "custom."

5. Failure of the police department to maintain records of intentional tort judgments did not cause this respondent's injury.

The court of appeals next found that "the department does not record intentional tort judgments entered against police officers, thereby limiting the ability of individuals charged with battery upon an officer to obtain evidence with which to rebut the charge and decreasing the departments ability to monitor whether officers are respecting the rights of El Monte citizens." (Memorandum decision at 6-7.)

In *Sarus v. Rotundo*, 831 F.2d 397, 402 (2nd Cir. 1987), the court noted "[W]e are neither directed to, nor aware of, any authority that imposes upon a police department the duty to maintain a cross-index filing system under which all complaints received, no matter how baseless, must be placed in the officers personnel file."

Tort judgments are part of the public record and information on tort judgments can be derived through running the name of any police officer through the civil index. The mere fact that petitioner does not maintain redundant records in its police department's files does not inhibit civil or criminal discovery of such judgments.

The record in this case contains no evidence that any officer involved in this incident had been the subject of a prior tort judgment. Not a shred of evidence exists that this "custom" of the police department directly caused any officer to engage in misconduct on the

assumption that his prior judgment would escape the scrutiny of police management. Consequently, no direct causal connection between this "custom" and the respondent's injury is contained in this record.

6. Petitioner's investigative technique did not cause this respondent's injury.

Petitioner is further faulted because "[a]lthough ordinary investigations are facilitated by the use of 'rap sheets' describing a suspects arrest record, no similar use is made of an officers complaint, tort claim or litigation history in investigations of police misconduct." (Memorandum decision at 7.)

In this case there was no evidence that any officer who was involved in the underlying incident was the subject of any prior citizen's complaint, government tort claim or civil litigation. In the absence of such proof, there is no evidence from which it could be inferred that any officer involved in this incident felt free to engage in acts of misconduct because prior acts of misconduct, or evidence thereof, would be ignored by the police department in the investigation of this incident. Without such evidence, it is impossible for a reasonable mind to draw the conclusion that this "custom" was a direct cause of this respondent's injury.

7. Petitioner's characterization of citizens' complaints as "administrative" did not cause this respondent's injury.

The court of appeals next notes that "a citizen cannot make a criminal charge against an officer; all

complaints are designated administrative, and are reported as such to the California Department of Justice by the investigating officer." (Memorandum decision at 7).

First, there is no evidence in the record that a citizen cannot cause the initiation of a criminal investigation by reporting misconduct. In fact, a citizen complaint may lead to a criminal investigation. Second, no one can "make" a criminal charge except the District Attorney. The record, in fact, contains evidence that criminal investigations have arisen from prior administrative investigations - - a separate investigation was launched by the Special Investigation Division of the Los Angeles County District Attorney's Office.

Finally, there is no evidence in this record which would lead any reasonable mind to conclude that the characterization of citizens' complaints in a statistical report to the Department of Justice would lead any police officer to engage in acts of misconduct, or that any officer in this case did so for that reason.

8. The lack of an Independent Review Board did not cause this respondent's injury.

The court of appeals next faults petitioner for not having "an independent body" to evaluate the evidence turned up in an investigation of alleged police misconduct. (Memorandum decision at 7). There is no empirical data in this record which indicates that an independent body evaluating the evidence in internal

investigations would lead to a decrease in the number of incidents of police misconduct.

Furthermore, the evidence in this case clearly indicates that an independent body does exist which can review police misconduct files. In this case the Chief sent a copy of respondent's counsel's letter of complaint to the District Attorney's Office, Special Investigation Division, along with a copy of the Chief's response thereto. The District Attorney's office had the opportunity to conduct an independent investigation which was unimpeded in any respect by the El Monte Police Department.

9. Resolving some prior complaints of police misconduct in favor of the officers involved did not cause this respondent's injury.

Last, without citation to any part of the record, the court of appeals found that "Chief Clayton testified that when evidence from an investigation supports a citizen complaint, but the officers involved deny the allegations, the complaint is usually disregarded." (Memorandum decision at 7).

In *Sledd v. Lindsey*, 780 F.Supp. 554, 558-559 (N.D.Ill. 1991), plaintiff alleged that many meritorious citizen's complaints were rejected by the Police Department Office of Professional Standards, the Police Board and the Police Superintendent, based in part on three deficiencies: (1) an accused police officer is always given the credibility edge when his/her word is challenged by only one accuser, (2) OPS does not

adequately investigate complaints, and (3) the code of silence prevents police officers from reporting or testifying about the misconduct of fellow officers. In holding that this evidence failed to show that the City had an unconstitutional custom the court noted:

> "Another problem with [the plaintiff's] allegations regarding the police disciplinary system is the difficulty in remedying the deficiencies they allegedly show. Assuming the truth of the allegations, what should the City's policymakers have done? Always believed the accuser in one-on-one credibility contests? Flip a coin? Given the OPS an unlimited investigation budget? Forced police officers to testify against other officers? Suspended officers facing complaints until the allegations against them are disproven? Suspended or fired officers with repeated complaints, regardless of the merits of the complaints?"

(Id., at 559.)

In light of the *Sledd* holding and rationale, such a "custom" by petitioner in this case is not *per se* unconstitutional.

Furthermore, in this case, there was no evidence that any officer involved in this incident had previously had a citizen's complaint resolved in his favor, or even knew of another officer who had so benefitted from

petitioner's "custom." In the absence of such evidence, the record cannot support the conclusion that this "custom" directly caused this respondent's injury.

The foregoing discussion amply demonstrates that respondent's injury was not caused by petitioner's customs or policies; petitioner's policies and customs are narrowly tailored and reasonably designed to facilitate investigations of reported instances of police misconduct. Petitioner did not order or officially sanction the alleged misconduct of its police officer employees on this occasion. Indeed, the jury's general verdict absolved those officers of personal liability for respondent's injuries. To hold petitioner liable for those injuries "would fly in the face of *Monell's* explicit holding that the [employer] cannot be held liable for the acts of its employees on the basis of *respondeat superior*. 'If the mere exercise of discretion by an employee could give rise to a constitutional violation, the result would be indistinguishable from *respondeat superior*.'" (*Spann & Spann v. Tyler Ind. Sch. Dist.*, 876 F.2d 437, 439 (5th Cir. 1989), citing *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S.Ct. 915, 925 (1988).) Petitioner's policies were not the cause of respondent's injuries as a matter of law.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

November 13, 1992

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
April 1, 1992
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

OTHA THOMAS RHODES,
Plaintiff/Appellee,

v.

RAOUL LINN,
Defendant,

and

CITY OF EL MONTE,
Defendant-Appellant.

NO. 89-55543
CV-87-2565-DT

MEMORANDUM[1/]

Appeal from the United States District Court

1/ This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

for the Central District of California
Dickran Tevrizian, District Judge, Presiding

Argued and Submitted February 11, 1991
Pasadena, California

Before: BOOCHEVER, HALL, and RHYMER, Circuit Judges.

The City of El Monte appeals the district court's denial of its motion for judgment notwithstanding the verdict ("JNOV") following a jury's verdict holding the City liable for injuries allegedly sustained by Otha Thomas Rhodes at the hands of officers of the El Monte Policy Department. The City argues that no reasonable jury could have found it liable under 42 U.S.C. § 1983 for causing Rhodes' injuries through a policy that sanctioned police misconduct, because the trial judge had found the evidence insufficient to show that the alleged final policymaker of the El Monte Police Department promulgated or acquiesced in such a policy. It also argues that there was insufficient evidence for a reasonable jury to have found that the City conspired to deprive Rhodes of his rights because of his race, in violation of 42 U.S.C. § 1985. Finally, it asserts that no reasonable jury could have found it liable for violations of state law under a theory of respondeat superior when each of its agents was either dismissed from the case or found not liable. Because we find the evidence sufficient to hold the City liable under section 1983, we need not

consider the evidence supporting the section 1985 and state law claims.

I

Standard of Review

JNOV is proper only when a court finds, without accounting for the credibility of witnesses, that the evidence, considered as a whole and viewed in the light most favorable to the non-moving party, can only support a verdict for the moving party. It is inappropriate when there is substantial evidence supporting a verdict in favor of the non-moving party. The Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148, 1151 (9th Cir. 1988). Employing this standard, we review a district court's refusal to grant a JNOV de novo. Los Angeles Memorial Coliseum v. National Football League, 791 F.2d 1356, 1360 (9th Cir. 1986), cert. denied, 484 U.S. 826 (1987).

II

The City's Liability Under Section 1983

In Monell v. Department of Social Serv., 436 U.S. 658, 690-95 (1978), the Supreme Court made clear that a municipality may not be held vicariously liable for the unconstitutional acts of its employees under the theory of respondeat superior. See, 436 U.S. at 691. Rather, the municipality may be held liable only when the employee's unconstitutional conduct either "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and

promulgated by that body's officers" or follows a custom so well-settled that it represents official policy. Id. at 690-91.

Rhodes has alleged that his injuries were caused by the City's policies regarding the investigation of complaints about police misconduct. These policies, he has maintained, "have the effect of insulating officers from accountability for serious misconduct." The jury was instructed, consistent with Monell, that in order to hold the City liable for Rhodes' injuries it had to find that the City either officially adopted a policy or acquiesced in a custom of concealing police misconduct, and thereby caused those injuries. The City urges that the jury's verdict was unreasonable because the judge had dismissed each of the defendants who could have been ultimately responsible for such a policy and because the jury had found officers Linn and Leonard not liable.

A

It is easy to dismiss the City's argument that it was unreasonable for the jury to find in favor of officers Linn and Leonard and nevertheless impose section 1983 liability on the City. The City suggests that the verdict in favor of the officers demonstrates that the jury found Rhodes did not suffer damages. But our ability to draw specific conclusions from general jury verdicts is limited.

Here, there are two alternative explanations for the jury's verdict, each as plausible as that offered by the

City. First, there was some evidence that Rhodes was attacked not by two officers but by several. The jury may have found the evidence sufficient to show that Rhodes was physically and verbally abused by one or more officers, but insufficient to identify officers Linn and Leonard as the perpetrators. Second, the jury was appropriately instructed that it should not hold the officers liable if it found that the officers reasonably believed their conduct was lawful. See Thorsted v. Kelly, 858 F.2d 571, 573 (9th Cir. 1988). Indeed, the jury was specifically instructed that it could hold the City liable for its own conduct even if it found that the officers were immune from liability.

B

The City also argues that it was unreasonable for the jury to find it liable because the judge made an offhand remark that he thought the evidence insufficient to connect the Chief to a policy. The Supreme Court has adhered to the position that municipal liability under section 1983 attaches only where a policy or custom can be ascribed to "the official or officials responsible for establishing final policy with respect to the subject matter in question." Pembaur v. Cincinnati, 475 U.S. 469, 483 (1986) (plurality opinion); see also Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 737 (1989); St. Louis v. Prapotnik, 485 U.S. 112, 123 (1988) (plurality opinion). Thus, if the jury had found that the Chief neither formulated a policy nor acquiesced in a custom, it would not have been reasonable for it to hold the municipality

liable. But neither the jury nor the judge made any such finding. The Chief was dismissed on procedural grounds, and there is no requirement that the jury must hold the policymaker liable in order for it to hold the municipality liable. See Owen v. City of Independence, 445 U.S. 622 (1980) (jury may hold municipality liable even if it finds that policymaker is protected by qualified immunity).

The judge's remarks on the evidence do not constitute a finding and are therefore irrelevant to our inquiry. Our only concern is whether the jury, given the evidence it heard and the instructions it received, could reasonably have found the City liable. The judge concluded that there was sufficient evidence for the jury to find that the Chief had acquiesced in a custom for which the City could be held liable, and he instructed the jury accordingly. Instruction number 54 states:

> To establish a custom, the plaintiff must prove that a practice of defendant City of El Monte officials and employees is so persistent, widespread, and so common and well settled as to fairly represent official policy. It must be a custom of which the managing agents of the El Monte Police Department had actual or constructive knowledge.

The jury was, therefore, instructed that it could hold the City liable if it found that Chief Clayton had acquiesced

in a department custom of permissiveness towards, perhaps quiet sanction of, police misconduct. The only question left for us to consider is whether the evidence was sufficient for the jury to make such a finding. We hold that it was.

Rhodes presented the jury with evidence of numerous procedures within the department demonstrating a conscious decision on the part of the City to avert its eyes to the misconduct of its police officers. First, the form on which complaints against officers must be set out warns potential complainers that it is a violation of the law to make a false complaint, but there is no similar inscription on the form used for non-police complaints. Second, the City allows "watch commanders" to reject citizen complaints. Third, the City will not investigate allegations of misconduct if a criminal charge that arose from the incident is pending, a practice that conceivably encourages abusive officers to level false criminal charges in order o forestall an investigation into their conduct. Fourth, although witness reports are generally sufficient to cause the department to initiate criminal investigations, the department will not investigate a report of police misconduct unless the victim of the misconduct comes forward. Fifth, the department does not record intentional tort judgments entered against police officers, thereby limiting the ability of individuals charged with battery upon an officer to obtain evidence with which to rebut the charge and decreasing the department's ability to monitor whether officers are respecting the rights of

El Monte's citizens. Sixth, although ordinary investigations are facilitated by the use of "rap sheets" describing a suspect's arrest record, no similar use is made of an officer's complaint, tort claim, or litigation history in investigations of police misconduct. Seventh, a citizen cannot make a criminal charge against an officer; all complaints are designated administrative, and are reported as such to the California Department of Justice by the investigating officer. Eighth, no independent body evaluates the evidence turned up in an investigation of alleged police misconduct. Finally, Chief Clayton testified that when evidence from an investigation supports the citizen complaint, but the officers involved deny the allegations, the complaint is usually disregarded.

We find this evidence ample to support a finding that Chief Clayton, as policymaker for the El Monte Police Department, acquiesced in a custom of complacency, if not hostility, towards allegations of misconduct by the department's officers and that this custom caused the injuries suffered by Otha Rhodes. Whatever the trial judge may have concluded about Chief Clayton's responsibility for a policy, he clearly instructed the jury that if it found the Chief had acquiesced in a custom, it could hold the City liable. Given the evidence supporting such a finding, it was proper for the trial court to deny the motion for JNOV. The order of the district court is therefore,

AFFIRMED.

DATED: _____

_____

United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
July 12, 1992
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

OTHA THOMAS RHODES,
Plaintiff/Appellee,

v.
RAOUL LINN,
Defendant,

and
CITY OF EL MONTE,
Defendant-Appellant.

NO. 89-55543

CV-87-2565-DT

ORDER

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehaering en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

DATED: _____

_____

United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
March 6, 1989
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ENTERED
March 7, 1989
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

OTHA THOMAS RHODES,
Plaintiff,

v.

RAOUL LINN, et al.,
Defendant.

CASE NUMBER: CV-87-2565-DT

JUDGMENT ON THE VERDICT
(For Defendant)

This cause having been tried by the Court and a Jury, before the Honorable Dickran Tevrizian, Judge presiding, and the issues having been duly tried and the

Jury having duly rendered its verdict; now, therefore, pursuant to the verdict,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff(s) Otha Thomas Rhodes take nothing on the complaint against the defendant(s) Raoul Linn, individually and as a police officer, and M. J. Leonard, individually and as a police officer. and that said defendant(s) have and recover costs from the plaintiff(s) as awarded.

Clerk, U.S. District Court

DATED: _____ By:_____
Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
March 6, 1989
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ENTERED
March 7, 1989
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

OTHA THOMAS RHODES,
Plaintiff,

v.

RAOUL LINN, et al.,
Defendant.

CASE NUMBER: CV-87-2565-DT

JUDGMENT ON THE VERDICT
(For Plaintiff)

This cause having been tried by the Court and a Jury, before the Honorable Dickran Tevrizian, Judge presiding, and the issues having been duly tried and the

Jury having duly rendered its verdict; now, therefore, pursuant to the verdict,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff(s) Otha Thomas Rhodes have and recover of and from the defendant(s) City of El Monte the sum of Eighty-Five Thousand and No/100 ($85,000.00) Dollars, together with costs, taxed in the sum of $_____.

Clerk, U.S. District Court

DATED: ___ _____ By:_____
Deputy Clerk